



REPUBLIC OF KENYA



KENYA LAW
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**Gatua v Njiru (Civil Application E182 of 2025)
[2026] KECA 14 (KLR) (23 January 2026) (Ruling)**

Neutral citation: [2026] KECA 14 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION E182 OF 2025
A ALI-ARONI, JA
JANUARY 23, 2026**

BETWEEN

JOHNSON LENSON MBOGO GATUA APPLICANT

AND

JOHN BOSCO NJIRU RESPONDENT

(Being an application for leave to file an appeal out of time from the Judgment of the High Court at Embu (L. Njuguna, J.) delivered on 19th December, 2024 in HCFA No. E005 of 2024)

RULING

1. Before the Court is an application by way of a notice of motion dated 5th December 2025, brought under rules 44 and 49 of the Court of Appeal Rules 2022 ('the Rules'), seeking leave to appeal out of time and for the memorandum of appeal be deemed to have been filed within time.
2. The application is predicated on the grounds on the face of the application, rehashed in the affidavit in support, sworn by the applicant on 5th December 2025, where he states that he was unable to file his appeal within time as his counsel was unable to upload the same on the Court Tracking System (CTS). The delay in submitting the memorandum of appeal was not intentional but was due to the registry's inability to process it in a timely manner.
3. The applicant further avers that he has a strong case and has shown diligence in pursuing his claim against the respondent. The application will not prejudice the respondent, and it is only fair to grant the applicant leave to file the appeal out of time.
4. The respondent's counsel, Njagi Lucy Muthanje, swore a replying affidavit dated 16th January 2026, wherein she states that the appeal ought to have been filed by the 21st March 2025 deadline. Additionally, the applicant failed to serve the letter requesting typed proceedings, which is a requirement for extending the computation of time under the Court's Rules.



5. Counsel further contends that the applicant has provided no sufficient and plausible reasons for the delay and that leave to appeal out of time is reserved for "vigilant litigants," not those who ignore the Rules. Further, section 50 of the *Law of Succession Act*, the High Court's determination on an appeal from the Magistrate's Court is final. The respondent has already executed the High Court judgment and is now the registered owner of the disputed land.
6. Counsel asserts the intended appeal is "frivolous" and not arguable, noting that the parties have been in litigation for over 10 years and deserve finality, and therefore the application ought to be dismissed.
7. Learned counsel for the applicant has filed submissions and authorities dated 16th January 2026 and submits that immediately following the judgment, the applicant demonstrated a clear intention to appeal. A notice of appeal was filed in the High Court on 23rd December 2024. On 20th December 2024, the applicant formally requested certified copies of the proceedings and judgment to prepare the record of appeal.
8. Counsel further urges that the failure to file the memorandum of appeal within the statutory 30-day period was not due to indolence, but rather external factors: The Court Tracking System (CTS) prevented the upload of a memorandum of appeal without an accompanying record of appeal and the certified proceedings were not provided by the court until 24th February 2025, well after the deadline.
9. Counsel submits that the applicant was unwell for a period and unable to issue instructions promptly after the proceedings were finally obtained. Counsel also submits that the matter in the lower court was still undergoing various stages of hearing of preliminary and interim applications, which contributed to the delay in finalising the appeal process.
10. Counsel asks the court to exercise its discretion based on the sufficiently explained delay, the lack of prejudice to the respondent, and in the interests of justice. In support of his submissions, counsel relies on *Salat v Independent Electoral and Boundaries Commission & 7 Others* (Application 16 of 2014) [2014] KESC 12 (KLR) (Civ) (4 July 2014) (Ruling) and *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* [1999] eKLR, where the court set out principles to be considered when granting an extension of time.
11. In opposition, learned counsel for the respondent filed submissions dated 19th January 2026, urging that the application for extension of time should be dismissed for the following reasons: under section 50 of the *Law of Succession Act*, decisions of the High Court on appeal from Magistrates' Courts are final and since the applicant has not sought or been granted leave the intended appeal is "dead on arrival"; the applicant failed to serve the letter bespeaking the proceedings on the respondent, which is a mandatory requirement under rule 84(2) of the Court of Appeal Rules and relies on *Mae Properties Ltd v Joseph Kibe & Another* [2017] eKLR, where this Court held that the rule as framed prescribes the legal consequence for non-institution of an appeal within the 60 days appointed by the Rules. Moreover, the said consequence is couched in mandatory, peremptory terms; the applicant has failed to provide a reasonable explanation for the delay or demonstrate that the appeal has a high chance of success; granting the extension would cause undue prejudice to the respondent. In support of this contention counsel relies on *Muiya & 11 Others v Kwetu Savings & Credit Co-operative Society Limited* [2024] KFCA 332 eKLR, where this Court relied on *Salat v IEBC* [supra], where the Court provided the foundational principles for granting an extension of time.
12. I have considered the application, the supporting affidavit, the replying affidavit, the rival submissions, and the law. The issue for determination is whether to grant an extension of time to file the memorandum of appeal and whether the memorandum of appeal filed be considered as having been filed within time.



13. Rule 4 of the Court of Appeal Rules states that; -

“The Court may, on such terms as may be just, by order, extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.”

14. In *Ruriga v Njuki* (Civil Application 100 of 2020) [2023] KECA 3 (KLR), the Court stated:

“...the factors I am supposed to take into consideration in the determination of an application of this nature are first, the length of the delay, secondly, reason(s) of the delay. Thirdly, possible arguability of the intended appeal and fourthly, any prejudice to be suffered by the opposite party should the relief sought by the applicant be granted. Fourthly (sic), any public interest that may be involved in the matter.”

15. Judgement in this matter was delivered on the 19th of December 2024. The notice of appeal was lodged on 23rd December 2024. The applicant states that proceedings were sought on 20th December 2024, though no copy of the letter was annexed to the application; indeed, the respondent complains that the said letter was not copied. Further, the applicant states that the proceedings and judgment were supplied by 7th February 2025. The delay is also attributed to counsel's failure to upload the memorandum of appeal on the CTS within 30 days due to the lack of a record of appeal.

16. Rule 84 states as follows:

“1. Subject to rule 118, an appeal shall be instituted

By lodging in the appropriate registry, within sixty days after the date when the notice of appeal was lodged—Institution of appeals.

- a. a memorandum of appeal, in four copies;
- b. the record of appeal, in four copies;
- c. the prescribed fee; and
- d. security for the costs of the appeal:

Provided that where an application for a copy of the Proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days after the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy.

2. An appellant shall not be entitled to rely on the proviso to sub-rule (1) unless the appellant's application for such copy was in writing and a copy of the application was served upon the respondent.
3. The period specified in sub-rule (1) for the institution of appeals shall apply to appeals from superior courts in the exercise of their bankruptcy jurisdiction.



17. Rule 84 gives an applicant 60 days from the time the notice of appeal is lodged to file the record of appeal, and not 30 days as alluded to by the applicant. Where the letter bespeaking the proceedings is written within thirty days of the date of the decision being appealed against and is served upon the rival party, time automatically starts to run from the date the certificate of delay is issued. Where the letter bespeaking proceedings was not served on the rival party, the applicant may seek an extension, provided sufficient reasons are given.
18. With the requirement of filing the record of appeal within 60 days, counsel for the applicant had up to the 21st of March 2025, as rightly stated by the respondent's counsel, to file the record of appeal. In the application, the applicant states that the proceedings and judgment were obtained on the 7th of February 2025. This was before the 60 days expired; no explanation has been offered why the record was not filed within the time. Assuming there was ignorance of the rule, no explanation has been advanced for the delay between the 7th of February 2025, when the typed proceedings and judgment were obtained and the 5th of December 2025, when the current application was filed. The attempt by counsel for the applicant to introduce the aspect of the applicant's sickness in the submissions is untenable and not backed by evidence.
19. The Supreme Court held in *Salat v Independent Electoral and Boundaries Commission & 7 Others* (Application 16 of 2014) [2014] KESC 12 (KLR) (Civ) (4 July 2014) (Ruling); that in considering an application for extension of time the Court would consider:

“ 16. Discretion to extend time was indeed unfettered.

It was incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there were any extenuating circumstances that could enable the court to exercise its discretion in favour of the applicant.

17. The court ought to consider the following principles in exercising the discretion to extend time for filing an appeal:
 - a. Extension of time was not a right of a party. It was an equitable remedy that was only available to a deserving party at the discretion of the court;
 - b. A party who sought extension of time had the burden of laying a basis for it to the satisfaction of the court;
 - c. Whether the court ought to exercise the discretion to extend time, was a consideration to be made on a case-by- case basis;
 - d. Whether there was a reasonable reason for the delay, which ought to be explained to the satisfaction of the court;
 - e. Whether there would be any prejudice suffered by the respondents if the extension was granted;
 - f. Whether the application had been brought without undue delay; and



- g. Whether in certain cases, like election petitions, public interest ought to be a consideration for extending time”. (Emphasis added)

20. This Court in *Abdul Azizi Ngoma v Mungai Mathayo* [1976] KLR 61, 62, on its part stated:

“We would like to state once again that this court’s discretion to extend time under rule 4 only comes into existence after ‘sufficient reason’ for extending time has been established and it is only then that other considerations such as the absence of any prejudice and the prospects or otherwise of success in the appeal can be considered.”

21. In this instant, I am of the considered view that no sufficient explanation has been adduced for the delay in filing the record of appeal. Further, no explanation has been given for the delay of about a year between the date the judgment was delivered and the date of the application, and, in any event, the same is certainly inordinate. Due to insufficient explanation, which would have led to consideration of the other factors alluded to above, the application is dismissed with costs to the respondent.

DATED AND DELIVERED AT NYERI THIS 23RD DAY OF JANUARY, 2026.

ALI-ARONI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

